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In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF THE COLORADO HIGH SCHOOL ACTIVITIES ASSOCIATION, IDAHO HIGH SCHOOL ACTIVITIES ASSOCIATION, KANSAS STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, MISSOURI STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, NEBRASKA SCHOOL ACTIVITIES ASSOCIATION, NEW MEXICO ACTIVITIES ASSOCIATION, OREGON SCHOOL ACTIVITIES ASSOCIATION, AND WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address the following two questions, which are addressed as part of the question framed in the petition for certiorari filed by the Tennessee Secondary School Athletic Association:[1]

> Whether the Sixth Circuit erred in holding that a voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as the voluntary agreement between the TSSAA and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis?
>
> Whether the Sixth Circuit erred in declining to recognize the substantial interest of state activity associations in fostering fair and level competition among member schools for purposes of protecting the best interests and safety of minor high school student participants?

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[1] *Amici* unequivocally supports the Petitioner's basis for requesting certiorari. *Amici* believes, however, that the Sixth Circuit's underlying reasoning that the voluntary agreement to join a high school athletic and activity association and abide by such association's by-laws and interpretive rules, such as between the TSSAA and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis, and the Sixth Circuit's declination to recognize any substantial state interest in fair and level competition for purposes of the best interests and safety of minor student participants, impacts each of the *Amici* and its member schools, both public and private, more directly and substantially, and has therefore elected to focus its presentation to the foregoing questions.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici* are all high school activity and athletic associations[2] (hereinafter collectively referred to as "the *Amici*"). The *Amici* respectfully submit this brief *Amici curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States. The *Amici* are nonprofit associations formed under the laws of their respective states by action of each such association's member schools, both public and private. Membership in each of the *Amici* is voluntary and is comprised of various public and private high schools within their respective states. None are agencies or subdivisions of the state or local governments. The activity associations are not supported directly by tax dollars, and derive the largest portion of their modest revenues from member dues and gate receipts.

The purpose of the associations is to implement rules for interscholastic competition promulgated by the member schools, and to oversee and conduct interscholastic competitions between member schools. All of the *Amici* provide in their constitutions for a democratic governing structure whereby the member schools, public and private, participate in the development, drafting, and approval of all rules governing the member schools and the participation of students in activities sponsored by the associations. To that end, the *Amici* have each enacted bylaws and

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, the *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *Amici* and their respective counsel made any monetary contribution to the preparation or submission of this brief.

[2] Colorado High School Activities Association (CHSAA), Idaho High School Activities Association (IHSAA), Kansas State High School Activities Association (KSHSAA), Missouri State High School Activities Association (MSHSAA), Nebraska School Activities Association (NSAA), New Mexico Activities Association (NMAA), Oregon School Activities Association (OSAA) and Wyoming High School Activities Association (WHSAA).

rules governing member high schools, including rules addressing eligibility requirements for participating in interscholastic athletic competitions.[3] Members contractually agree to abide by these member promulgated bylaws and rules. In many associations, each year the board of education of each public school and the governing board of each private school will pass a resolution stating that such school accepts the constitution and bylaws of the voluntary association as the minimum standards for conducting the school's interscholastic program.

These voluntary activities associations are committed to the development of America's youth through participation in high school interscholastic competition in a myriad of activities, including athletics, speech, debate and music. The *Amici* submit this brief and urge this Court to grant certiorari because the governance of interscholastic competition by and among the member schools of each of the above named activities associations has been and will continue to be directly, substantially and adversely impacted by the Sixth Circuit Court's ruling.

The District Court and the Sixth Circuit (1) incorrectly concluded that the voluntary agreement to join a high school athletic and activity association and abide by such association's bylaws and interpretive rules, such as that between the Tennessee Secondary School Athletic

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[3] The constitution and bylaws of each of the *Amici* Activities Associations and the National Federation of High School Associations can be found on their respective internet websites, to-wit: National Federation of High School Associations – http://www.nfhs.org; Colorado High School Activities Association – http://www.chsaa.org; Idaho High School Activities Association – http://www.idhsaa.org; Kansas State High School Activities Association – http://khsaa.org; Missouri State High School Activities Association – http://www.mshsaa.org (2006-2007 Official MSHSAA Handbook provided in PDF format upon request); Nebraska School Activities Association – http://www.nsaahome.org; New Mexico Activities Association – http://www.nmact.org; Oregon School Activities Association – http://www.osaa.org; and Wyoming High School Activities Association – http://www.whsaa.org.

Association (TSSAA) and Brentwood Academy, is irrelevant to a First Amendment constitutional analysis; and (2) incorrectly declined to recognize the substantial interest of high school activities associations in fair and level competition to protect the best interests and safety of minor student participants.

Because of the unique perspective and role of activity associations in their respective states that serves to promote interaction and cooperation between public and private schools in the United States to the benefit of the students that those schools seek to educate, the *Amici* believe that the attached brief will aid this Court in considering the petition. The *Amici* believe that this brief can add insight as to why it is important for this Court to grant the petition.

SUMMARY OF ARGUMENT

I. *A private school's voluntary contract with a high school activity association and its participation in the democratic rule making process of such association constitutes a voluntary and knowing limit on the scope of such private school's Constitutional rights under the rules so promulgated.* The Sixth Circuit incorrectly focused on the question of whether Brentwood Academy had waived its right to sue on the basis of its constitutional rights. Rather the Sixth Circuit should have focused on the nature of the agreement entered into between the private school and the association it voluntarily joined. By joining the activities association and entering into an agreement to abide by the bylaws and rules established by the member schools to provide for fair and equal competition, a private school is agreeing to participate in the democratic rule making process, and voluntarily and knowingly limiting the scope of its Constitutional rights regarding the rules so promulgated. By ignoring those facts, the Sixth Circuit majority enables the private school to challenge what is in effect its own rule.

The Sixth Circuit's holding creates a serious dilemma for activities associations. Either the association can (1) stay the course and risk years of economically devastating litigation; (2) rescind any challenged rule; (3) not apply a challenged rule to private schools; or (4) exclude private schools from membership. Alternative (1) is unpalatable for not-for-profit organizations like the *Amici*. Alternative (2) would fundamentally change the nature of the program of competition and disregards the legitimate programmatic objectives of the majority of the member high schools. Alternative (3) would lead to a patently un-level playing field among the members. Alternative (4) is really the only viable alternative left to these associations.

The Sixth Circuit's holding is particularly problematic for the *Amici* because of the inherently speech-related activities they govern (speech, debate, music) and because of competition rules that of necessity restrict speech. An association could be confronted with defending a constitutional lawsuit under intermediate scrutiny by a music competitor who wanted to perform a composition not on the approved list; and the association would have the burden of showing a legitimate and substantial interest in prohibiting non-list compositions and that the interest is served by prohibiting the particular non-list composition.

II. *Activity associations have a "substantial interest" in fostering a level playing field for student competitors in high school activities*: The Sixth Circuit erred in finding as part of its First Amendment analysis of the TSSAA recruiting/undue influence rule under the "intermediate scrutiny" standard that the association did not have a substantial interest in "fostering a level playing field." Activity associations have as their central purposes the fostering and maintenance of a level playing field for the students competing in the activity programs of member high schools. Each association's rule making process involves educators who are specialists in the field of fostering, promoting and caring for the safety and best

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interests of students, and assuring that students participating in school activities are provided a fair chance to participate in a manner that enhances their education and does not exploit them. The principle of competitive equity or a level playing field is basic value of schools, in fact our society as a whole, and is clearly a "substantial interest" of activity associations such as the *Amici* in this case. The Sixth Circuit failed to acknowledge that fairness or comparable opportunity is an inherent part of any competitive endeavor.

For the foregoing reasons, the *Amici* submit that the Petition for a Writ of Certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

ARGUMENT

Interscholastic activities supplement and enhance the educational experience of the students of participating schools. The mission statements of the *Amici* echo this tenet.[4] Interscholastic competitions in athletics, speech, debate, and music instill in students an appreciation of teamwork, responsibility to self and others, personal discipline and the satisfaction of achieving a team or personal goal; attributes that cannot always be conveyed in an academic setting. These attributes are benefits that stay with students for the rest of their lives. However, high school activities must be kept subordinate to the academics

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[4] See, by way of example, WHSAA, Rules and Regulations, "Values" page 6, "The WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION believes that ***interscholastic activities programs are essential to the education of youth, and therefor, are an integral part of the school curriculum . . . The values of high school activities and their impact upon the lives of Americans are immeasurable . . . Not only do interscholastic activities benefit and directly influence participants, but they also instill pride and unifying spirit among students, fans, schools, and communities throughout the nation. The inherent values of activity programs are both realistic and vivid.***"

program and student progress therein. The lower courts in the present case correctly recognized this hierarchy of academics over activities.[5] However, the Sixth Circuit failed to recognize the critical interest of activity associations to foster the educational value of activities through competitive equity, and that the voluntary agreement of member schools to abide by rules is essential to protect that interest.

I. The Sixth Circuit erred in holding that a voluntary agreement to join a high school activity association and abide by such association's bylaws and interpretive rules, was irrelevant to a First Amendment constitutional analysis.

The Sixth Circuit erred in focusing on whether Brentwood Academy waived its right to challenge the constitutionality of a TSSAA rule rather than focusing on the nature of the agreement entered into between the private school and the association. *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 262 F.3d 543, 549-551 (6th Cir. 2001) ("*Brentwood II*").

A. *Voluntary Associations of Educational Institutions*: Public and private schools have formed voluntary associations to establish rules of competition that keep activities in their proper place as an enhancement of the curriculum and overall educational experience of the students that they serve. All of the *Amici* employ a school member representative based rule making process to establish the bylaws necessary to further these goals. The

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[5] The Sixth Circuit Court of Appeals in its majority opinion found that the TSSAA, in promulgating the recruiting/undue influence rule, had a legitimate and substantial interest in keeping high school athletics in their proper place subordinate to academics, and in protecting student athletes from exploitation. *Brentwood Academy v. Tennessee School Athletic Association, et al.*, 442 F.3d 410, 425 (6th Cir. 2006) (hereinafter referred to as "*Brentwood III*").

representatives of each member school, public and private, are educators who are charged with the education and with the care and safety of the students participating in school activities. These educators bring their expertise to the adoption of the rules needed to assure activities are (1) kept in their proper place as an extension of the classroom; (2) not a deterrent to student learning; (3) available to the maximum number of students; and, (4) safe and in the best interests of all students. These educator representatives develop, draft and adopt the bylaws which govern the activities of their respective schools. It is through this democratic representative rule making process that member schools, like Brentwood Academy, can seek the adoption of a new rule, a change in an existing rule, or the outright repeal of a rule. Such a member based legislative process has been described as "the most elemental hallmark of the democratic process and one of associative groups – a majority vote." *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521, 524 (N.Y. 1996).

By joining the activities association and entering into an agreement to abide by its bylaws and rules, a private school is agreeing to participate in the democratic rule making process, and voluntarily and knowingly limiting the scope of its Constitutional rights with regard to the rules so promulgated. By ignoring these salient facts, the Sixth Circuit majority enables the private school to challenge what are in effect its own rules. Such a circumstance cannot stand, as it is essential to activity associations that each of the member schools that voluntarily join the association abides by a common set of rules.

B. ***Participation in the Democratic Rule Making Process Limits the Scope of Private School's Constitutional Rights*****:** In *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646; 132 L. Ed. 2d 564 (1995), this Court found that students voluntarily relinquished Fourth

Amendment search and seizure protections in order to participate in high school activities.[6] Similarly, by choosing to join an activities association and participating in the association's democratic rule making process, private schools voluntarily relinquish some constitutional rights with regard to the application of association bylaws and rules to their speech. Such a rule protects the constitutional rights of the private schools, while recognizing the private school's voluntary relinquishment thereof to preserve the fair and equal participation in interscholastic activities.

C. A "Defacto" Two Class Membership: The Sixth Circuit decision creates a defacto two class membership among the *Amici*, one class made up of private schools, and the other of public schools, each having markedly different rights.

1. *Private School Members:* This Court in *Brentwood Academy v. Tennessee Secondary School Athletic Associations, et al.*, 531 U.S. 288, 305; 121 S. Ct. 924, 935; 148 L. Ed. 2d 807, 823 (2001), and the Sixth Circuit in *Brentwood II*, recognized that private schools are beneficiaries of the protections of the First Amendment and Fourteenth Amendment to the U.S. Constitution against state action by way of a cause of action brought under 42 USCS § 1983. *Id.* at 554. Thus, any decision of an activities association addressing the conduct of activity school programs by private schools or actions of individual private school instructors or coaches would be deemed protected speech; such protections being subject only to the voluntary limits on such rights relinquished by the private school (see, infra).

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[6] "There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 657 (1995).

2. *Public School Members*: Conversely, the protections of the First Amendment and Fourteenth Amendment to the U.S. Constitution against state action are not available to public school districts, or their employees acting within the scope of their duties. In *Triplett v. Tiemann*, 302 F. Supp. 1239, 1242 (D. Neb. 1969), several public school districts sued the State Board of Education seeking to have a state funding statute declared unconstitutional under the supremacy clause and the equal protection clause. The court dismissed the public schools' equal protection claim, holding that school districts are legally not subject to injury under the Fourteenth Amendment, which has no application to the acts of a State against its own political subdivisions.[7]

In *Garcetti v. Ceballos*, 126 S. Ct. 1951; 164 L. Ed. 2d 689 (2006), this Court held that, "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960; 164 L. Ed. at 701. Thus, any decision of an activities association addressing the content of school programs of public schools or actions of individual public school instructors or coaches would NOT be protected by the Constitution.

Thus, while a public school cannot legally challenge the constitutionality of an association bylaw, a private school has the right to challenge the constitutionality of every association bylaw or interpretive rule.

3. *Between a Rock and a "Hard Place"*: The Sixth Circuit's holding creates a serious dilemma for activities associations. Either the association can (1) stay

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[7] "The plaintiff school districts are legally not subject to injury under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment has no application to the acts of a State against its own political subdivisions." [Citations omitted].

the course and risk litigation; (2) rescind any challenged rule; (3) exempt private schools from challenged rules; or (4) exclude private schools from membership. None of these options is in the best interests of the children. However, setting the best interests of students aside from a legal standpoint, the *Amici* find themselves in a no-win situation.

a. *Catch No. 1 – Private School's First Amendment Rights*: The Sixth Circuit holding that the private schools' voluntary agreement to abide by association bylaws does not abrogate any First Amendment right means that such schools may challenge any association rules on the basis of a violation of freedom of speech, religion, or association.[8] For the *Amici*, this dilemma is even more problematic because of their rules that of necessity restrict speech within the context of competition in the inherently speech-related activities they govern (speech, debate and music, and in some states drama and/or journalism). Many associations have rules that govern the "time, place and manner" of speech at such contests, some of which may in fact not be content-neutral.[9] This Court has given schools broad powers to limit the time, place, manner and content of student speech, and have applied those broad powers to extra-curricular activities. See, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675; 106 S. Ct. 3159

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[8] The First Amendment assures the freedom of expression, including the implied right of association. The Supreme Court first recognized this right in *NAACP v. Alabama*, 357 U.S. 449; 2 L. Ed. 2d 1488; 78 S. Ct. 1163 (1958).

[9] See, 2006-2007 OSAA, Speech Handbook, Rule 13.5.4(c), "Offensive humor and materials shall not be permitted"; IHSAA – Activities Regulations, Speech, "Use of Materials": "1. Material presented by all contestants shall be appropriate for competition and public performance by high school students. A signed Principal's Approval Form must be submitted to both district and state tournament managers to verify the principal's approval of all material presented by his/her students"; see, also, NSAA, "Rules of Competition," Play Production ByLaws (5.5.1).

(1986) (where this Court found that a school district acted entirely within its permissible authority in imposing sanctions upon a student in response to his offensively vulgar, lewd, obscene or plainly offensive speech); and, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260; 108 S. Ct. 562 (1988).[10] The deference given schools over student speech should apply to speech of a member school that is regulated to protect the children served by all of the member schools of an activities association.[11]

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[10] In *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), this Court held that while students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, school authorities may place limitations on student speech if they have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students; and that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

[11] The rationale for such deference was eloquently stated by the Missouri Court of Appeals' eloquent statement in a 1973 dispute over Missouri State High School Activity Association's summer camp rule in *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 740-41 (Mo. App. 1973):

> Along with entrusting the education of our children to teachers and administrators, we also entrust the control and supervision of the extracurricular activities incident to that education. Implicit in the responsibility for these activities is the power to make reasonable rules and regulations. We are dealing here with numerous schools who have voluntarily joined an association. **As members of this association, they may, by majority vote, enact rules to govern their interaction. It is obvious that chaos would result without such rules**. It is also obvious that the members are in the most advantageous position to appreciate the regulations under which they must act to achieve desired goals. A court should not interfere with the enactment of those regulations as long as they are reasonable and do not infringe on public policy or law. (Emphasis added; footnotes omitted).

Under the Sixth Circuit's holding, an association could be confronted with defending a constitutional lawsuit, under intermediate scrutiny, by a music competitor who wanted to perform a composition not on the approved list, or by a speech contestant whose speech contained cursing or was immorally suggestive. The association would have the burden of showing a legitimate and substantial interest in prohibiting such conduct.

(1) ***Absurd Result***: No association can function if each application of a common competition rule is subject to First Amendment constitutional litigation. All activities require a common set of rules for effective, fair and rewarding competition that supports the educational mission of the participating schools.

(a) ***Competition Rules***:

(i) ***Athletic Competition***: There are numerous applications of rules that limit the freedom of individuals and teams in athletic competition (football – off sides, pass interference; basketball – double dribble; wrestling – prohibiting a slam take down; track and field – requiring an athlete to stay within the discus ring for a throw to count; baseball and softball – three strikes and you're out!!).

(ii) ***Scholastic Competition***: Activity Association rules for scholastic competitions frequently address issues that implicate speech (debate contests – no scouting by a coach, judge or contestant in order to obtain advance information or an opponent's case or argument; speech contest – approval of content of material presented;[12] music contest – performance of compositions only on the approved list provided by the association; one-act play contest – material presented

[12] See, footnote 9 infra.

must be appropriate for competition and public performance by high school students;[13] and drill team/cheerleading – dress standards.[14]

(b) ***Conduct Rules*****:** All activities associations have rules requiring students to conduct themselves in a "sportsman-like" manner during interscholastic competition. Such conduct rules prohibit certain types of physical or verbal expressions that are not acceptable or may endanger personnel. These conduct rules certainly inhibit the "free" exercise of speech, association and action.

Competition and conduct rules and regulations are an inherent part of any interscholastic competition and level the playing field and give each student an equal chance at success. The *Brentwood II* and *Brentwood III* decisions destroy equal application of such rules of competition. To subject the application of every competition and conduct rule when applied to a private school or its students to a First Amendment "intermediate scrutiny" standard would make governance of high school activities impossible.

(2) ***Constant Cloud of Litigation*****:** The *Amici* will continually be threatened with litigation over the enforcement of their rules. Such threat will either chill the application of rules or require associations with limited resources to defend multiple court actions to establish that each regulation that is challenged is "content-neutral" under the First Amendment intermediate scrutiny test.

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[13] See, WHSAA, State Drama Tournament – Rules and Regulations, 8.4.3, Choice of Material, page 101, "Instructors will exercise good judgment in selecting plays with literary theatrical merit and which are suitable for high school level audiences."

[14] See, IHSAA – Activities Regulations – Dance/Drill, "Dress Standard": Dress Standard – Idaho dance/drill teams are expected to wear costumes which are appropriate for participation at the high school level.

b. *Catch No. 2 – Exclusion of Private School Members*: All of the *Amici* have as members most all of the high schools participating in interscholastic activities in their respective states. Excluding private schools from their membership invites litigation. Some courts have required activity associations to admit private school members,[15] while others have upheld the denial of membership.[16] In either case, the associations were required to incur the substantial cost to defend the decision to deny private school membership. The *Brentwood II* and *III* decisions will bring further pressure to separate the high school activities of public and private schools. And to what end – the exclusion of private schools that are valued members of the *Amici* to the detriment of the students of such private and public schools?

II. The Sixth Circuit erred in declining to recognize the activity associations' substantial state interest in fostering fair and level competition among member schools.

"Undue influence/recruiting rules" are essential to foster a level playing field, the primary purpose of which is to promote and foster competitive equity among schools in

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[15] See, *Friends Academy v. Section VIII of New York State Public High School Athletic Ass'n*, 154 Misc. 2d 1 (N.Y. Misc. 1992), where the court held the denial of membership to an activities association constituted a constitutionally impermissible denial of the nonpublic school's right to equal protection under the law, and declared the nonpublic school a member of the association.

[16] *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521 (N.Y. 1996) held that the association's member referendum requirement did not deprive a private school of equal protection of the law, stating that the association's membership qualifications for nonpublic schools were consistent with and furthered the identified purposes by reasonably assuring that all member schools had the opportunity to compete on a relatively *level playing field*.

order to serve the best interests of the educational experience and welfare of all students. High school athletic and activity associations have as one of their central purposes the fostering and maintenance of a level playing field among member high schools. The Sixth Circuit held that the TSSAA had a legitimate interest "in fostering a level playing field," but that such interest was not substantial (*Brentwood III*, 442 F.3d at 425). The Court based this decision on a purported lack of evidence, stating "defendants (the TSSAA) can cite no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest." *Brentwood III*, 442 F.3d at 427. Such a statement ignores the basic mores of fairness that is a part of our American society; "fairness" in the sense of comparable opportunity which is an inherent part of any competitive endeavor. In athletic competition, as in many other activities, the need to give both sides a fair chance for success is self-evident and does not require proof to establish that the need is substantial.

A. *Activity Associations Have a Substantial Interest in Competitive Equity Among Member Schools*: Another term used by courts for "level playing field" is "competitive equity." The critical importance of "competitive equity" has been recognized by courts throughout the country. (See, *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 467 N.W.2d 21 (Mich. 1991) (Age eligibility rule was held to be reasonably drafted to accomplish the association's purpose of maintaining "competitive equity" among member schools); *Indiana High Sch. Ath. Ass'n v. Reyes*, 694 N.E.2d 249, 257-258 (Ind. 1997) (Upheld association's penalties for using ineligible players); and, *Jones v. California Interscholastic Federation*, 197 Cal. App. 3d 751, 758 (Cal. Ct. App. 1988) (Upheld rule that created opportunity for younger students and competitive equity among association member schools by averting situations where teams of more veteran athletes encounter teams from schools where athletes have not been held back)). Competitive equity provides greater

opportunities for student participation and enhances the benefits of participation, such as the rewards of striving for and achieving a goal, being part of a team effort, dealing with success and failure, and knowing that effort will be required in some fashion and that success is possible. Where competitive equity is not maintained, these ideals become frustrated. Students quickly discern that goals either need to be diminished or cannot be achieved, fewer experience success, and participation is stunted.

B. ***A Level Playing Field or Competitive Equity Promotes Student Safety and Welfare:*** The level playing field concept directly addresses issues and concerns for student safety and welfare, particularly in contact sports. Student safety is a universally recognized substantial interest of high school activities associations. Courts throughout the country have recognized the critical role activity association bylaws, rules, and regulations play in promoting the safety and best interests of students through fostering a level playing field.

1. ***The "Age Rule":*** All of the *Amici* have an "Age Rule";[17] an objective rule that establishes an age limitation, usually 19 or 20, for participation. The Age Rule protects the safety of younger participants with or against whom an older participant might compete or participate.[18]

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[17] See, Age Rule: CHSAA, Constitution and Bylaws, Article 17, ByLaw 1760; "Recruiting"; IHSAA, Rules and Regulations, Rule 8-2; KSHSAA, Rules and Regulations Governing Grades 7-12, Rule 17, "Age"; MSHSAA, 2006-2007 Official Handbook ByLaw "Age Requirements" 232, page 26; NSAA, Bylaws for All Activities, ByLaw 2.3, "Age"; NMAA, Rule 6.4, "Undue Influence"; OSAA, Rules, Rule 8.3 "Age"; WHSAA, Rules, 6.3.0 "Age Requirements."

[18] "There is a legitimate state interest sustaining the [Age 19] rule – the safety of the younger players." *Arkansas Activities Ass'n v. Meyer*, 805 S.W.2d 58, 61 (Ark. 1991). See, also, *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, 568 S.E.2d 32, 38 (W. Va. 2002), where the court upheld the application of the age rule to a student who was six

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2. *Eight Semester Rule*: The "Eight Semester Rule" levels the playing field by preventing the practice of "red shirting" students for athletic purposes. See, *Jones v. California Interscholastic Federation*, supra, 197 Cal. App. 3d 751, 758 (Cal. Ct. App. 1988); *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, supra, 568 S.E.2d 32, 39 (W. Va. 2002).[19]

3. *Classification of Schools*: All of the *Amici* classify school members by student enrollment. The rationale of such classifications has been noted by at least one association.[20] The MSHSAA in an unreported state

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feet four inches tall, weighed 280 pounds, ran the forty-yard-dash in 5.3 seconds, and would compete in this contact sport against students approximately five years younger; stating: ***The safety of younger, smaller, more inexperienced students would be unreasonably compromised.***" (Emphasis added); and, *Pottgen v. MSHSAA*, 40 F.3d 926, 929 (8th Cir. 1994), where the court held that the age limit rule was an essential eligibility requirement in a high school interscholastic program designed to help reduce the competitive advantage flowing to teams using older athletes; protect younger athletes from harm; discourage student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. The court stated, "***These purposes are of immense importance in any interscholastic sports program.***" (Emphasis added).

[19] In *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, supra, 568 S.E.2d 32, 39 (W. Va. 2002), the court cited *Hamilton v. West Virginia Secondary Schools Activities Commission*, 386 S.E.2d 656 (W. Va. 1989), which described "red shirting" as follows: "Red-shirting is a practice of delaying a student's academic pace and postponing his initial participation in athletics to permit him to gain physical and athletic maturity before beginning the period of eligibility for competitive athletics . . . ***It is the cynical and pernicious manipulation of a student's academic standing for the derivative athletic glory of adults – over-zealous coaches and parents . . . It is a corrupt and mean-spirited practice.***" (Emphasis added).

[20] See, IHSAA, Rules & Regulations, Rule 2 – Classification: 2-1 School enrollment will be the initial basis for establishing classification. Decisions on final placement may include consideration of the following factors: 1. Minimizing loss of instructional time; 2. Reducing travel time and distance; 3. Facilitating equitable scheduling; 4. **Maximizing**

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trial court case articulated the "primary objectives for classifying schools in athletic competition" as being (a) to provide for more equitable competition in team activities; (b) to provide for more equity among schools competing in team and group activities; (c) to protect the physical welfare of students engaging in contact sports; and, (d) to expedite the administration of district and state events with a minimum of conflict with the academic program.[21]

Significantly, the plaintiff in the case, a student in a private school, challenging a possible change in the classification of the MSHSAA member school she attended, asserted among the reasons that her school should not be moved to a higher class, that her teammates and herself would be competing against "teams with more players, more depth, subjecting plaintiffs to an increased risk of injury."[22]

4. ***Undue Influence/Recruiting Rule:*** All of the *Amici* have an "undue influence" and/or recruiting rule.[23] Unlike the Sixth Circuit, courts in other jurisdictions have found that activities associations, and their member schools, have a substantial interest in protecting students

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attention to safety concerns relative to competitive scheduling and pairing. (Emphasis added).

[21] *Lauren Bax, et al. v. Missouri State High School Activities Association*, Circuit Court of Boone County, Missouri, Case No.: 02CV167612, pages 4-5.

[22] *Id.* at pages 3-4.

[23] See Undue Influence/Recruiting Rules: CHSAA, Constitution and Bylaws, Article 19, ByLaw 1900, "Recruiting"; IHSAA, Rules and Regulations, Rule 8-15; KSHSAA, Rules and Regulations Governing Grades 7-12, Rule 19, "Undue Influence"; MSHSAA, 2006-2007 Official Handbook, ByLaw "Undue Influence" 216, page 24; NSAA, Bylaws for All Activities. ByLaw 2.8, "Undue Influence"; NMAA, Rule 1.8, "Undue Influence"; OSAA, Rules, Rule 8.7 "Undue Influence"; WHSAA, General Member School Rules and Regulations, Undue Influence, 4.1.0.

from such recruiting and protecting other students from the effects of recruiting on the playing field.[24]

The interest of activity associations in securing student safety and welfare is paramount to association member schools, and establishes a clear "substantial interest" that needs no specific data; it is self evident and settled law. This "substantial interest" clearly meets the third prong of the intermediate scrutiny standard applied by the Sixth Circuit in the *Brentwood* decisions.

5. *Other Rules that Level the Playing Field*: All of the *Amici* have rules that require regular student attendance in school, domicile requirements to prevent transfers for athletic purposes between school years or between activity seasons, prescribe amateurism and limit monetary awards to students. The core philosophy behind these rules are that students play where they reside, they do not transfer for athletic reasons without suffering restrictions on their eligibility, play without monetary reimbursement, and coaches are restrained from offering inducements that would cause students to suffer loss of eligibility. These core standards are essential and interrelated to create the unique amateur school programs that are played across America under "Friday night lights."

CONCLUSION

A private school's determination to enter into a contract with a high school activity association and its participation in the democratic rule making process of such association constitutes a voluntary and knowing limit on

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[24] See, *Mississippi High Sch. Activities Ass'n v. Coleman*, 631 So. 2d 768 (Miss. 1994); *Kentucky High School Athletic Association v. Hopkins County Board of Education*, 552 S.W.2d 685, 687 (Ky. App. 1977); *Mozingo v. Oklahoma Secondary Sch. Activities Ass'n*, 575 P.2d 1379 (Okla. Ct. App. 1978); and, *In re United States ex rel. Missouri State High School Activities Assoc.*, 682 F.2d 147 (8th Cir. 1982)).

the scope of such private school's Constitutional rights to challenge the rules so promulgated. Further, the high school activity associations with both public and private school members have a "substantial interest" in fostering a level playing field for student competitors in high school activities.

For the reasons set forth above, the *Amici* submit that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

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Respectfully submitted,

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